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In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 630

THE BARRETT LINE, INC., APPELLANT

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION AND MISSISSIPPI VALLEY BARGE LINE CO., ET AL.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO

BRIEF FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION

OPINIONS BELOW

The *per curiam* opinion of the district court (R. 28–29) was rendered on July 28, 1944, but is not reported. The report of the Interstate Commerce Commission (R. 8–13) is not published.

JURISDICTION

The final decree of the three-judge district court was entered on July 28, 1944 (R. 29). Petition for appeal was presented and allowed on Sep-

tember 15, 1944 (R. 30, 33–34). Probable jurisdiction was noted on December 4, 1944 (R. 149). The jurisdiction of this Court is conferred by Section 210 of the Judicial Code, 36 Stat. 1150, as amended by the Urgent Deficiencies Act of October 22, 1913, 38 Stat. 208, 220 (28 U. S. C. 47a), and Section 238 of the Judicial Code, as amended by the Act of February 13, 1925, 43 Stat. 938 (28 U. S. C. 345).

QUESTIONS PRESENTED

1. Whether the Interstate Commerce Commission properly held that a contract water carrier is not entitled to a "grandfather" permit under Part III of the Interstate Commerce Act, where the carrier's operations were exempt from regulation or remote from the "grandfather" date, or were found to be insufficiently proved.

2. Whether appellant showed that its proposed operations would be consistent with the public interest and the national transportation policy, thereby entitling it to a permit to engage in new operations as a contract water carrier.

STATUTE INVOLVED

The pertinent provisions of the Interstate Commerce Act, as amended, are set forth in the Appendix, *infra*, pp. 45–49.

STATEMENT

By applications filed with the Interstate Commerce Commission on May 19, 1941, appellant

water carrier, the Barrett Line, Inc., sought a permit as a contract carrier by water, in interstate or foreign commerce, of general commodities, with certain exceptions, between points on the Mississippi River and its tributaries. Under Section 309 (f) of Part III of the Interstate Commerce Act (49 U. S. C. 909 (f)), appellant sought "grandfather" rights (R. 35–43), and, as a precautionary measure, "new" rights (R. 49–52) to perform such operations. In the alternative, appellant sought a certificate (R. 36, 51) as a common carrier under Section 309 (a) (49 U. S. C. 909 (a)). (R. 9.)

Division 4 of the Commission found that appellant or its predecessors had conducted water-carrier operations on the Mississippi River and its tributaries for approximately a hundred years. Its equipment included, at the time of hearing, two towboats and twenty-one barges. Ordinary operations were under term contracts entailing the movement of large quantities of material over periods of time averaging several months. The contracts were negotiated on the basis of the nature and volume of cargo, time required for delivery, the season of the year, and other factors which might affect the cost of transportation. Single-trip shipments were occasionally accepted under special circumstances. (R. 10.)

Protests against the granting of the application were filed by other water carriers (R. 63), after

which a hearing was held on September 1, 1942, before one of the Commission's examiners, at which testimony and exhibits were submitted by appellant (R. 63–144), providing a description of the operations from January 1, 1936, to August 11, 1942, and including specific statements as to the transportation performed in this period of some six and one-half years (R. 9, 10). The Commission found that an exhibit of record (R. 117–126) contained a description of all services performed by appellant in this period. This evidence reveals, as the Commission found, that the transportation, except for one shipment of fabricated steel and piling in 1936, was largely of bulk commodities consisting of stone and petroleum products, exempt from regulation under provisions of Section 303 (b) and (d). Other services rendered in this period consisted of towing for other carriers or for shippers of bulk commodities, chartering vessels to carriers or shippers, salvage operations, storage of vessels belonging to others, and furnishing steam to other vessels for boiler cleaning. Of these other services, the Commission stated that only the chartering of vessels might be subject to regulation under the Act. The proof as to the chartering of vessels did not disclose the nature of the services rendered, the commodities transported, or the points served. Under the proof submitted, the Commission held that it would not be warranted in finding that appellant

was on the "grandfather" date, January 1, 1940, and continuously since, engaged in chartering operations subject to regulation under the Act. In one instance in 1936, a contractor's fleet of work boats was moved, which operation the Commission termed probably exempt from regulation under its order of October 29, 1941, in Ex Parte 147, *Towage of Floating Objects*.[1] (R. 10, 11, 80, 118.) There was testimony to the effect that at some indefinite time prior to 1936, appellant had engaged in certain non-exempt transportation, but this claim was not supported by shipping records (R. 117–126) except for the shipment of fabricated steel and piling in 1936 (R. 11, 12).

The Commission held that "grandfather" rights must be predicated upon proof of *bona fide* operation on and since January 1, 1940 (sec. 309 (f)), that *bona fide* operation means a holding out substantiated by actual operations consistent therewith, and that actual operations must have been within a reasonable length of time from the date

[1] By this order, the Commission had exempted the transportation of certain floating objects by contract carriers from the requirements of Part III of the Interstate Commerce Act, in view of the provisions of Section 303 (e) thereof (49 U. S. C. 903 (e)). See 250 I. C. C. 525. However, in *Towage of Floating Objects (Logs and Piling in Rafts)*, 250 I. C. C. 525, the order was vacated insofar as it applied to the transportation of logs and piling in rafts, for the Commission determined that such transportation involved competition with common carriers subject to Part I, II or III of the Act and therefore was not within the exemption of Section 303 (e).

of January 1, 1940. It stated that a reasonable length of time may vary with the particular circumstances in each proceeding, but that one non-exempt shipment in 1936 and others at an indefinite period of time prior thereto were entirely too remote to establish *bona fide* operation on January 1, 1940. (R. 11–12.)

In respect to the second application seeking a permit or certificate authorizing new operations, the Commission found that the application proposed no new operation, since appellant proposed no change in mode of operation but planned to continue doing business as in the past. Most of appellant's equipment was then being used in the exempt transportation of bulk petroleum products. It was recognized that the petroleum movement at that time was an emergency operation occasioned by the war, but the Commission considered applicant's normal operation for a period of approximately five years before the war as determinative of the operating rights involved. During that period the only non-exempt transportation performed was the one shipment of fabricated steel and piling in 1936. No evidence was submitted to show present or future public convenience and necessity for the proposed operation. The Commission found that appellant had failed to show that it proposed any new operation, or that a new operation by it would be consistent with the public interest or the national transpor-

tation policy (sec. 309 (g)) or required by public convenience and necessity (sec. 309 (a)). (R. 12.)

The ultimate finding of the Commission was that appellant was not in *bona fide* operation on and since January 1, 1940, as a common or contract carrier by water, in performance of transportation subject to the provisions of Part III of the Act, that it had not been shown that a new operation by the applicant, as a contract carrier by water would be consistent with the public interest and the national transportation policy, or that present or future public convenience or necessity would require such new operation by it as a common carrier. Accordingly, the applications were denied. (R. 12–13.) The Commission's report and order were entered on June 18, 1943 (R. 8–13). Appellant's petition for reconsideration (R. 14–23) was denied by the full Commission on December 6, 1943 (R. 14).

Appellant filed its complaint in the United States District Court for the Southern District of Ohio on April 3, 1944 (R. 1–8). Answers were filed by the United States and by the Commission (R. 24–28) denying the material allegations of the complaint. Interventions were filed in support of the Commission's order by the American Barge Line Company, the Union Barge Line Corporation, the Campbell Transportation Company, and the Mississippi Valley Barge Line Company, which are parties here (see R. 33, 148–149). On July 28, 1944, the court filed a *per curiam*

opinion, sustaining the Commission's order in all respects, and adopting by reference the findings and conclusions of the Commission, as stated in Division 4's report of June 18, 1943 (R. 8–13), as the court's findings of fact and conclusions of law (R. 28–29). The decree dismissing the complaint was entered on the same day (R. 29). This Court noted probable jurisdiction on December 4, 1944 (R. 149).

SUMMARY OF ARGUMENT

I

A. Those of appellant's operations which are exempt under Section 303 (b) and (d) of Part III of the Interstate Commerce Act furnish no basis for a "grandfather" permit as a contract carrier under Section 309 (f). To be a contract carrier by water, one must be engaging in "transportation". Section 202 (e). However, Part III of the Act is made inapplicable by Section 303 (b) and (d) to "transportation" by water of certain commodities. Consequently, transportation of such commodities would not entitle appellant to a permit under Section 309 (f), for as to them it would not be "in bona fide operation as a contract carrier by water" (sec. 309 (f)). The legislative history of the Act and decisions of the Commission support the view that permits may only be granted for non-exempt transportation. In *Russell Bros. Towing Co., Inc., Common Car-*

rier Application, 250 I. C. C. 429, and *Moran Towing & Transportation Co., Inc. Applications*, 253 I. C. C. 269, on which appellant relies, the carriers' transportation was both non-exempt and exempt. Those cases have not been applied where the transportation was entirely exempt. *Upper Mississippi Towing Corp. Common Carrier Applications*, 260 I. C. C. 292, 293; cf. *Central Barge Co. Applications*, 260 I. C. C. 329, 334, 339.

B. Other than its chartering operations, appellant's non-exempt operations were too remote from January 1, 1940, the "grandfather" date, to entitle it to a "grandfather" permit under Section 309 (f). In the six years before the hearing, appellant's only non-exempt shipment took place in 1936. Other non-exempt transportation, not evidenced by shipping records, occurred from 20 to 25 years before the statutory date or at some undisclosed time prior to 1936. The legislative history of Part III of the Act indicates that Congress meant to establish a definite date upon which water carriers must have been operating in order to receive a permit without proving public interest in its operations. It also indicates that Congress intended that the judicial and administrative interpretations of Part II, containing the motor-carrier provisions, be followed in interpreting Part III. Intepretations of Part II establish that "grandfather" rights must be strictly construed and that the burden is on the applicant

to show the applicability of the "grandfather" clause. *E. g., United States* v. *Carolina Carriers Corp.*, 315 U. S. 475, 480–481; *McDonald* v. *Thompson*, 305 U. S. 263, 266. Because of the nature of their service, the Commission has been more lenient with water carriers than with motor carriers, but it has frequently held that proof of operations several years before the "grandfather" date and not since, is too remote from that date to entitle a water carrier to "grandfather" rights. Its interpretation is entitled to great weight. *United States* v. *American Trucking Associations*, 310 U. S. 534, 549.

C. Appellant's chartering operations do not entitle it to a "grandfather" permit, for all but two were evidently exempt from regulation by Section 303 (b) and (d) and Section 303 (g). The two non-exempt instances occurred either after the critical date or too long before it to establish "grandfather" rights.

The Commission may give only that weight to an applicant's evidence as seems proper (*Swayne & Hoyt, Ltd.* v. *United States*, 300 U. S. 297), and here it held that appellant's evidence of chartering operations was too meager. The record was too barren of information to enable the Commission to specify the "business of the carrier and the scope thereof" (sec. 309 (g)).

C. F. Harms Co. Contract Carrier Application, 260 I. C. C. 171, does not conflict with the Commission's decision herein, for the applicant there

had furnished sufficient proof of "grandfather" chartering operations. In that case, the Commission followed the rule that "grandfather" rights can only be predicated on a showing of what the applicant "does in bona fide operation" on the statutory date. Here there was no such showing. At any rate, courts are not concerned with the consistency of inconsistency of the Commission's decision in a particular case with ~~prior~~ other decisions which it has rendered. *E. g., Western Paper Makers' Chemical Co.* v. *United States*, 271 U. S. 268, 271.

II

Appellant's president and counsel stated at the hearing that appellant applied in the alternative under Section 309 (g) for "new" rights to operate "out of an abundance of caution" and that they thought such an application never applied to it, but the Commission's refusal to grant such rights is now assailed. Before the Commission may issue a "new" permit, it must find that the applicant's proposed service "will be consistent with the public interest and the national transportation policy" (sec. 309 (g)). It held that appellant failed to show that its service would be consistent with these standards. These standards have reference to the public need for adequate transportation (see *N. Y. Central Securities Co.* v. *United States*, 287 U. S. 12, 25), and what is consistent with them is an ultimate question of fact for the Commission,

whose determination thereof will not be set aside if supported by a rational basis and substantial evidence. Cf. *McLean Trucking Co.* v. *United States*, 321 U. S. 67, 87–88.

The only evidence that the proposed operations would be consistent with the public interest and national transportation policy was the fact that appellant had in the past been in operation. Here, no non-exempt operations had been conducted since 1936, except possibly a few insufficiently proved chartering operations. Certainly appellant's exempt transportation does not furnish evidential value that non-exempt transportation by it would be consistent with the dual standards prescribed by Section 309 (g). It would not "foster sound economic conditions" within the national policy to grant a "new" permit to appellant, when so far as shown, there is no public need for such service.

It was not erroneous for the Commission to overrule its trial examiner's recommendation that a "new" permit be issued, for Congress vested the decision-making authority in the Commission rather than its examiners. *Baltimore & Ohio Railroad Co.* v. *United States*, 298 U. S. 349, 370–371.

ARGUMENT

Introductory—Although appellant filed an alternative application for a "grandfather" or pub-

lic convenience and necessity certificate as a common carrier by water, it has apparently abandoned all claims except for a permit authorizing either "grandfather" or "new" rights as a contract carrier by water (Br. 2). Hence, this brief will not deal with common carriage.

I

THE COMMISSION PROPERLY HELD THAT APPELLANT WAS NOT ENTITLED TO A PERMIT BASED ON "GRANDFATHER" RIGHTS

A. APPELLANT'S EXEMPT OPERATIONS FURNISH NO BASIS FOR A "GRANDFATHER" PERMIT

Appellant transported stone in bulk and petroleum products on and since January 1, 1940 (R. 123–126). The transportation by water carriers of bulk commodities and liquid cargoes is expressly exempted from regulation by Section 303 (b) and (d) of Part III of the Interstate Commerce Act (Appendix, *infra*, p. 46). It is nevertheless contended that the transportation of such commodities constitutes "bona fide operation" on the "grandfather" date under Section 309 (f) (Appendix, *infra*, pp. 47–48), entitling appellant to a "grandfather" permit (Br. 13–15). The Commission held that appellant "failed to establish that it was in bona fide operation on January 1, 1940, and continuously since, in the performance of transportation subject to part III of the act" (R. 12).

It seems to be appellant's view that since Section 309 (f) provides that a permit should issue to a carrier engaged in *bona fide* operations as a contract carrier by water on January 1, 1940, and since the definition of a contract carrier by water in Section 302 (e)[2] does not refer to exemptions, its exempt operations furnish the basis for a "grandfather" permit. This argument overlooks the fact that to be a "contract carrier by water," a carrier must, as defined in Section 302 (e), be engaging in "transportation", and Section 303 (b) and (d) provides that "Nothing in this part [III] shall apply to the transportation" by water "of commodities in bulk" and "of liquid cargoes in bulk." Consequently, Section 309 (f), containing the "grandfather" clause for permits, is inoperative where the carrier is conducting only exempt operations; for such a carrier is not "in bona fide operation as a contract carrier by water" (sec. 309 (f)).

Appellant is in an anomalous position in seeking a permit, for at the Hearings on the legislation which became the Transportation Act of 1940 (54 Stat. 898), including Part III, its president opposed the applicability of the proposed

[2] Section 302 (e) provides in pertinent part:

The term "contract carrier by water" means any person which, under individual contracts or agreements, engages in the transportation (other than transportation referred to in paragraph (d) and the exception therein) by water of passengers or property in interstate or foreign commerce, for compensation. * * *

enactment to its business, and the legislators were favoring him, as well as other water carriers opposing this legislation, by the exemption provisions. Hearings, S. Committee on Interstate Commerce, S. 2009, 76th Cong., 1st sess., pp. 357–374; Hearings, H. Committee on Interstate and Foreign Commerce, H. R. 2531 and H. R. 4862, 76th Cong., 1st sess., pp. 1063, 1083, 1093; see 86 Cong. Rec. 11768; 84 Cong. Rec. 5871, 5884, 9700, 10102. No regulation was intended whenever the exemption provisions applied. H. Rep. No. 1217, 76th Cong., 1st sess., pp. 20–21.[1] The following portion of the Conference Report on S. 2009, which became the Transportation Act of 1940, evidences that permits or certificates are only to be granted for non-exempt transportation:

> The conference bill includes as section 303 (l) a new provision providing that whenever transportation exempted under the provisions of subsection (g) or (e) of such section becomes subject to regulation the carrier may continue operation for 120 days without a certificate or permit, and if application for a certificate or permit covering the previously exempted transportation is made within such period, the Commission shall issue a certificate or permit, whichever is appropriate, authorizing the transportation previously exempted. [H. Rep. No. 2016, 76th Cong., 3d sess., p. 78.]

[1] For further discussion of the exemptions, see *idem*, pp. 7–8; H. Rep. No. 2832, 76th Cong., 3d sess., pp. 83–84.

Senator Wheeler, Chairman of the Senate Committee on Interstate Commerce, explained on the floor of the Senate that "We are not regulating the bulk carriers either. So the bill [S. 2009] does not affect them" (84 Cong. Rec. 5877). And Representative Bulwinkle, a sponsor of the bill, read on the floor of the House the following excerpt from H. Rep. No. 1217, 76th Cong., 1st sess.:

> Subsections (b) and (c) [of Section 303] are unqualified exemptions, and the carriers exempted are not required to apply to the Commission for exemption. These exemptions are written in terms of the transportation engaged in, so that any other transportation which the carriers may engage in will be subject to such regulation as may be provided for. [84 Cong. Rec. 9765.]

In accord with the obvious meaning of the exemption provisions, the Interstate Commerce Commission has denied "grandfather" permits or certificates to water carriers whose transportation is exempt. *Upper Mississippi Towing Corp. Common Carrier Applications*, 260 I. C. C. 292, 293;[*] *Gallagher Bros. Sand & Gravel Corp. Con-*

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[*] In the *Upper Mississippi Towing Corp.* case, the entire Commission held that "no certificate could be issued to authorize such activities [transporting bulk and liquid commodities and towing for other carriers] because the provisions of part III do not apply to transportation services of those types, by reason of the exemptions in section 303 (b), (d), and (f) (2)." (260 I. C. C. at p. 293.)

tract Carrier Application, 260 I. C. C. 224, 225.[5] Appellant relies, however, on *Russell Bros. Towing Co., Inc., Common Carrier Application*, 250 I. C. C. 429, and *Moran Towing & Transportation Co., Inc., Applications*, 260 I. C. C. 269 (Br. 13, 14–15). In the *Russell Bros.* case, Division 4 of the Commission held that in determining the applicant's "grandfather" rights, both its exempt and non-exempt transportation should be considered to avoid obtaining "an incomplete and distorted picture of the nature and extent of its operations" (250 I. C. C. at p. 434).[6] However, in a later case, *Card Towing Line, Inc., Contract Carrier Application*, 250 I. C. C. 621, Division 4 made it clear that the *Russell Bros.* doctrine does not apply to a carrier whose transportation is entirely exempt, and it took the same view in the instant case, which was decided almost a year after the *Russell Bros.* case. The entire Commission similarly limited the *Russell Bros.* case in

[5] See also *Union Sand and Gravel Co. Applications*, 250 I. C. C. 141; *McCarren Towing Line, Inc., Contract Carrier Application*, 250 I. C. C. 168; *Ralph Raike Applications*, 250 I. C. C. 77, 178; *River Sand and Gravel Co. Contract Carrier Application*, 250 I. C. C. 370; *Carroll Towing Co., Inc., Contract Carrier Application*, 250 I. C. C. 417; *Bronx Towing Line, Inc., Contract Carrier Application*, 250 I. C. C. 614, 615; cf. *Atwacoal Transportation Company Contract Carrier Application*, decided February 12, 1945, by Division 4, not yet reported.

[6] For an excellent discussion of the limits to which the *Russell Bros.* doctrine should be extended, see Commissioner Miller's dissent in the *Moran Towing* case, 260 I. C. C. 269, 280.

Upper Mississippi Towing Corp. Common Carrier Applications, 260 I. C. C. 292, 293, decided last May.

In *Moran Towing & Transportation Co., Inc., Applications,* the case was heard first by Division 4 (250 I. C. C. 541) and then by the entire Commission (260 I. C. C. 269).[7] Division 4 granted a "grandfather" certificate to the applicant, which had been engaged in the general towage service. The Commission stated that the evidence showed that the "applicant did not attempt to restrict its ["grandfather"] services to those operations which have been exempted" (250 I. C. C. at p. 546), and that its service was performed without regard to the nature of the cargo carried (260 I. C. C. at p. 282), which factors distinguish it from the present case. The entire Commission recognized that some of Moran's service was subject to regulation under Part III rather than exempt (260 I. C. C. at p. 271). Furthermore, it relied on the *Russell Bros.* doctrine, which, less than three months before, it had limited to situations where some of the transportation was non-exempt (*Upper Mississippi Towing Corp. Common Carrier Applications,* 260 I. C. C. 292, 293). Also, it denied Moran "grandfather" rights where

[7] The entire Commission cut down the territorial scope of the "grandfather" certificate granted by Division 4 because the applicants' transportation to certain areas had been performed a year before the "grandfather" date. In all other respects, Division 4's decision was affirmed.

only exempt transportation of oil (sec. 303 (d) was involved (260 I. C. C. at p. 275). We therefore do not believe that the Commission meant to depart from the requirement established in innumerable cases that at least part of the transportation must have been non-exempt. Division 4 has seemingly taken a similar view of the final decision in the *Moran Towing* case, for in *Central Barge Co. Applications*, 260 I. C. C. 329, 334, 339, before issuing a "grandfather" certificate, it pointed out that some of the transportation involved was non-exempt. See also *Bouchard Transportation Co., Inc., Contract Carrier Application*, decided March 10, 1945, by Division 4, not yet reported; *Independent Pier Company Contract Carrier Application*, decided June 2, 1944, by Division 4, not yet reported; *Sheridan Transportation Company Contract Carrier Application*, decided March 18, 1944, by Division 4, not yet reported; cf. *Atwacoal Transportation Company Contract Carrier Application*, decided February 12, 1945, by Division 4, not yet reported.

The full Commission evidently considered the *Moran Towing* and *Russell Bros.* cases to be inapplicable to the present case, where (according to the proof established for the "grandfather" period) only exempt transportation was involved, for it denied (R. 14) appellant's petition for reconsideration which relied on both those decisions (R. 18). If this Court believes that the *Moran Towing* case expresses the view that the Commis-

sion is authorized to issue "grandfather" permits or certificates when the entire transportation is exempt, it is submitted that in order to guide the Commission and curtail litigation the case should be disapproved as conflicting with the exemption provisions of Part III of the Act.

B. APPELLANT'S NON-EXEMPT OPERATIONS, OTHER THAN ITS CHARTERING OPERATIONS, WERE TOO REMOTE FROM THE "GRANDFATHER" DATE

Under the provisions of Section 309 (f) of Part III of the Interstate Commerce Act (49 U. S. C. 909 (f)), appellant would be entitled to a "grandfather" permit as a contract carrier by water upon proof that it was "in bona fide operation as a contract carrier by water on January 1, 1940, * * * and has so operated since that time." Appellant's operations since January 1, 1940, have been practically without change, and therefore its right to a "grandfather" permit depends entirely upon the evidence of operation on January 1, 1940. There is no dispute as to that evidence. The controversy concerns appellant's contention that the Commission has applied the evidence contrary to the meaning of the statute.

Appellant does not deny that, other than chartering operations, its operations on January 1, 1940, consisted solely of exempt transportation of bulk stone and petroleum products. The only non-exempt shipment in the period of more than six years from January 1, 1936, to August 11, 1942, the final date in appellant's exhibit of opera-

tions (R. 117–126), was of fabricated steel and piling and took place in November 1936 (R. 119). Besides depending upon this shipment to establish "grandfather" rights,[8] appellant states that its operations as a water carrier were by nature sporadic, irregular, and infrequent, making it impossible to select any limited period of its existence as representative of its business. Accordingly, its president, Mr. Barrett, testified that prior to 1936, there were shipments of a variety of commodities, some not exempt by statute, which, with the one 1936 shipment of fabricated steel and piling, allegedly suffice to support its claim for the "grandfather" permit, as contemplated by Section 309 (f). Mr. Barrett testified to transportation of steel pipe from Pittsburgh to New Orleans for some four or five months in 1920, when railroads were embargoed from handling pipe, and for two or three months in 1920 of powder from Nitro, West Virginia, and Old Hickory, Tennessee, to shipside, New Orleans (R. 67–68). He also claimed that his company pioneered in the movement of cement, oil, automobiles, bauxite ore, and paving brick, the automobile trade lasting for a number of months, and the bauxite ore being taken over by the Aluminum Company as a private carrier (R. 68–69). The transportation of automobiles occurred in 1918 (R. 103), the bauxite

[8] The shipment of steel and piling is the only non-exempt one reflected by appellant's shipping records (R. 117–126).

ore prior to 1915–1916 (R. 113), and the other commodities mentioned in the testimony were transported at some undisclosed time prior to 1936 (R. 85). Transportation of the fabricated steel and piling shipped in 1936 and of some of the various commodities named by Mr. Barrett is not exempt from regulation. The Commission held these shipments too remote from the crucial date of January 1, 1940, to sustain the claim of "bona fide operation" on that date, as required by Section 309 (f) for "grandfather" permits.

The Commission has distinguished the characteristics of water carriage from motor carriage, where transportation even a few months before the motor-carrier "grandfather" date of June 1, 1935, has been held insufficient to support a claim of "bona fide operation" on that date.[9] No such

[9] The phrase "bona fide operation" is also found in Section 206 (a) and 209 (a) of the Interstate Commerce Act, containing the "grandfather" provisions for motor carriers. The Commission has held in many cases that shipments more than a few months prior to June 1, 1935, are too remote to evidence "bona fide operations" on that date. In *Jack Cole Company, Inc.* v. *United States*, No. 850 this Term, decided February 12, 1945, the Commission held that an interruption of service of less than a year, occurring after June 1, 1935, and before the hearings were completed, constituted a fatal interruption of services which were actually conducted on the "grandfather" date. The judgment of the district court upholding the Commission was affirmed by this Court. In *Gregg Cartage Co.* v. *United States*, 316 U. S. 74, the Commission's decision that an interruption of some three or four months, due to receivership, constituted a fatal interruption of service, was sustained.

rigid requirement as to the "grandfather" date of Section 309 (f) has been made in the case of water carriers,[10] because the Commission has recognized that water-carrier operations are by nature more irregular and infrequent. Appellant made just one non-exempt shipment within the six-year period preceding the hearing, and this occurred more than three years prior to January 1, 1940. Besides chartering operations, discussed *infra*, pp. 30–37, the only other claimed non-exempt shipments occurred at undisclosed dates prior to 1936, such as iron pipe and powder some 22 years, and automobiles and bauxite ore some 25 years before January 1, 1940.

In effect, appellant asks the Court to hold that operations conducted 20 to 25 years prior to the "grandfather" date, with one shipment some three

[10] See *Moran Towing & Transportation Co., Inc., Applications*, 260 I. C. C. 269, 273; *Thames River Line, Inc., Common Carrier Application*, 250 I. C. C. 245; *C. G. Willis Contract Carrier Applications*, 250 I. C. C. 179; *Tennessee Valley Sand & Gravel Co. Common and Contract Carrier Application*, 250 I. C. C. 599; *River Sand & Gravel Co. Contract Carrier Application*, 250 I. C. C. 370; *Choctaw Transportation Co. Contract Carrier Application*, 250 I. C. C. 106, 107; *Pope & Talbot, Inc., Common and Contract Carrier Applications*, 250 I. C. C. 117; *Schafer Bros. S. S. Lines Contract Carrier Application*, 250 I. C. C. 353. Appellant relies on the last two cases (Br. 15). There the applicants had been in non-exempt operation on and since January 1, 1940. Certain ports which the applicants had omitted to serve in the "grandfather" period were included in the authority granted because of the peculiarities of applicants' lumber trade, and because they had continued to hold out to serve such ports in that period and had actively solicited requests to serve them.

years prior to that date, are sufficient to prove "bona fide operation" on and since January 1, 1940, as required for the issuance of a permit under Section 309 (f). Under the uncontroverted facts of the case and disregarding appellant's chartering operations, appellant would only be entitled to a permit under Section 309 (f) if the transportation conducted in 1915–1916, 1918 and 1920, and the one shipment in 1936, should be held to constitute *bona fide* operations on and since January 1, 1940. To so decide would necessitate interpreting the legislative phrase, "January 1, 1940," as including operations in all those preceding years. The legislative history of Part III of the Act indicates a purpose to fix a definite date, upon which water carriers must have been in operation, to entitle them without further proof to a certificate or permit. The water carrier provisions were enacted by S. 2009, 76th Cong., 3d sess. In a letter from Commissioner Eastman, Chairman of the Legislative Committee of the Commission, the Conference Committee was asked to insert the "grandfather" date of June 1, 1940, rather than "June 1, 1939," or "on the date of the enactment of this amendatory Act," as found in the House and Senate versions of S. 2009. Omnibus Transportation Legislation, House Committee Print, 76th Cong., 3d sess., pp. 60, 61. The date January 1, 1940, was subsequently chosen by the Conference Committee. H. Rep. No. 2016, 76th Cong., 3d sess., p. 81; H. Rep. No. 2832, 76th

Cong., 3d sess., p. 90. This change of six months in the "grandfather" date indicates that Congress did not contemplate that "grandfather" rights could be established by proof of service in 1935 and before but instead, that Congress, at the Commission's request, carefully selected a particular date.

Moreover, the legislative history of Part III discloses that Congress was modeling it on Part II,[11] the motor-carrier portion of the Act, and intended that the interpretations of Part II be followed in interpreting Part III. As Senator Wheeler, Chairman of the Senate Committee on Interstate Commerce, stated (S. Rep. No. 433, 76th Cong., 1st sess., p. 4):

> The present provisions of the Interstate Commerce Act have been redrafted in what is considered a more logical and orderly manner so as to apply to the newly regulated carriers, saving so far as possible the existing language so that full advantage may be taken of the many interpretations, both judicial and administrative, which have been put upon the respective sections.

[11] The following authorities reveal that the permit provisions of Part III were derived from the permit provisions of Part II: S. Rep. No. 433, 76th Cong., 1st sess., p. 27; H. Rep. No. 1217, 76th Cong., 1st sess., pp. 24, 27; Omnibus Transportation Legislation, House Committee Print, 76th Cong., 3d sess., pp. 60, 61; see also appellant's president's testimony at the Hearings, H. Committee on Interstate and Foreign Commerce, H. R. 2531 and H. R. 4862, 76th Cong., 1st sess., pp. 1065–1066.

Decisions in "grandfather" cases under Part II of the Act establish that "grandfather" rights must be strictly construed (*McDonald* v. *Thompson*, 305 U. S. 263, 266; *Alton R. Co.* v. *United States*, 315 U. S. 15, 21; *United States* v. *Carolina Carriers Corp.*, 315 U. S. 475, 480; *Gregg Cartage Co.* v. *United States*, 316 U. S. 74, 83), and the burden is on the applicant to show plainly that it comes within the "grandfather" clause. *McDonald* v. *Thompson*, 305 U. S. 263, 266; *Gregg Cartage Co.* v. *United States*, 316 U. S. 74, 83; *Crescent Express Lines* v. *United States*, 320 U. S. 401, 409. The phrase "bona fide operation", which is employed in both Parts II and III, was construed in *United States* v. *Carolina Carriers Corp.*, 315 U. S. 475, 480–481, as follows:

> The Act provides the test of "bona fide operation." That standard carries the connotation of substantiality. It also makes clear that a holding out to serve a specified area is not alone sufficient. It is "actual rather than potential or simulated service" which is required. *McDonald* v. *Thompson*, 305 U. S. 263, 266. Substantial, as distinguished from incidental, sporadic, or infrequent, service is required.

See also *Alton R. Co.* v. *United States*, 315 U. S. 15, 21; *Loving* v. *United States*, 32 F. Supp. 464, 467 (W. D. Okla.), affirmed *per curiam*, 310 U. S. 609; cf. *United States* v. *Maher*, 307 U. S. 148, 153–154.

Except for the practical differences in characteristics between the two kinds of carriers, a difference which the Commission took into account in the present case (see R. 12), there appears to be no reason why the "grandfather" language in Part III should be given a different meaning than that given to the same language in Part II.[12] Certainly there is nothing in the legislative history, or administrative or judicial decisions that reasonably supports any other view than that the congressional purpose was the same in both Parts. On the basis of only one shipment of steel in 1936, and the vaguely described transportation of other non-exempt commodities 20 to 25 years prior to January 1, 1940, there is no semblance of support for appellant's claim to have been in "bona fide operation" as a contract carrier by water on the "grandfather" date.

The Commission has applied here, although less strictly in view of the nature of water carriage,[13] the principles applied to "grandfather" motor carriers, requiring operations at a time reasonably

[12] There have been no judicial decisions on this point other than in the instant case. Compare *United States* v. *Pennsylvania R. R. Co.*, Nos. 47–48 this Term, decided January 29, 1945; *Cornell Steamboat Co.* v. *United States*, 321 U. S. 634; *Portland Tug & Barge Co.* v. *United States*, 55 F. Supp. 723 (D. Ore.); *De Bardeleben Coal Corp.* v. *United States*, 54 F. Supp. 643 (D. Pa.). These are the only cases we have found which deal with the Commission's interpretations of Part III, and in all of them the Commission's decisions were upheld.

[13] See fn. 10, *supra*, p. 23.

approximating the "grandfather" date, and refusing to accept operations several years prior to the "grandfather" date. Among water-carrier cases in which this question was decided is *Federal Materials Company, Inc., Contract Carrier Application*, 250 I. C. C. 149, in which it was held that failure to show operations (other than exempt transportation) from January 1, 1939, to February 31, 1941, precluded a "grandfather" permit under Section 309 (f). A certificate was denied in *Thames River Line, Inc., Common Carrier Application*, 250 I. C. C. 245, 246, in respect to service between two points, where such service was not shown since 1938, more than one year prior to the "grandfather" date, except for one trip between the points in 1941." In *New England Steamship Co. Common Carrier Application*, 250 I. C. C. 184, 185, operations conducted on and prior to 1936 but not since that time, were held too remote to sustain a claim of such operations on January 1, 1940. In numerous cases, "grandfather" certificates and permits have been granted upon proof of operations beginning in the years prior to and extending up to January 1, 1940. In no instance disclosed by the study of a number of decided water-carrier cases has a "grandfather" certificate or permit been granted, based solely

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" To the same effect are *W. E. Hedger Transp. Corp.*, 250 I. C. C. 753, 755, *Moran Towing & Transportation Co., Inc., Applications*, 260 I. C. C. 269, 275, 277; see also *McLain Caro-*

upon proof of operations more than one year prior to January 1, 1940, and apparently the Commission has in all cases held operations two, three, or more years prior to that date, as too remote to sustain such applications.[15] To establish a different rule herein would disrupt principles which have been universally applied to all water-carrier applications in the four years of regulation, and which have almost universally been accepted by the carriers. In fact, so far as is known, the instant case is the first by an applicant water carrier seeking a review of the Commission's determination of its "grandfather" rights since the 1940 enactment of Part III.[16]

The Commission was here dealing with a new statutory regulation of carriers which had not before been regulated. In interpreting the legislative meaning, it has had the advantage of prior experience, particularly in applying the almost identical motor-carrier provisions of Part II, and the support of judicial standards established by this Court. Accordingly, the Commission's interpretation was entitled to great weight. As was

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lina Line, Inc., Common Carrier Application, 250 I. C. C. 327, on which appellant relies (Br. 15).

[15] See cases cited, *supra*, p. 28; see also fn. 14, *supra*, p. 28.

[16] In *Cornell Steamboat Co.* v. *United States*, 321 U. S. 634, the carrier argued that it was not subject to regulation under the Act or, in the alternative, was subject to regulation as a contract rather than a common carrier. It did not urge that, if subject to regulation, the Commission's determination of its "grandfather" rights was erroneous.

said in *United States v. American Trucking Associations*, 310 U. S. 534, 549:

> The Commission and the Wage and Hour Division, as we have said, have both interpreted sec. 204 (a) as relating solely to safety of operation. In any case such interpretations are entitled to great weight. This is peculiarly true here where the interpretations involve "contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new." Furthermore, the Commission's interpretation gains much persuasiveness from the fact that it was the Commission which suggested the provisions' enactment to Congress.

C. ON THE RECORD, APPELLANT'S CHARTERING OPERATIONS DO NOT ESTABLISH "GRANDFATHER" RIGHTS

Appellant insists that its chartering operations entitle it to a "grandfather" permit (Br. 16–18). However, appellant is here seeking a "grandfather" permit to operate as a contract carrier in the transportation of general commodities. In view of the requirement of Section 309 (g) that a permit specify the "business of the carrier and the scope thereof", and since chartering operations constitute one a contract carrier by water only "as to the vessel so furnished" (sec. 302 (e)), a "grandfather" permit based on chartering operations would confine appellant to chartering opera-

tions (see *C. F. Harms Co. Contract Carrier Application*, 260 I. C. C. 171, 173), and such a permit would not give appellant what it wants and tried to obtain. In any event, we maintain that on the record appellant's chartering operations do not establish any "grandfather" rights. As stated, Section 302 (e) defines those who charter vessels to a non-carrier as "contract carriers by water" as to the vessels so furnished. The Commission consequently recognized (R. 11) that "grandfather" chartering operations entitled a carrier to a "grandfather" permit under Section 309 (f). However, all but two of appellant's chartering operations disclosed by the record (R. 117–126) were evidently exempt from regulation[17] by Section 303 (b) and (d) and Section 303 (g) of the Act (Appendix, *infra*, pp. 45-46). The two non-exempt instances occurred either after the critical date or too long before it to establish "grandfather" rights.[18]

[17] A contract carrier engaged in chartering operations is not subject to regulation if the hirer employs the vessels in non-exempt transportation. *Union Sand & Gravel Co. Applications*, 250 I. C. C. 141, 142; *River Sand & Gravel Co. Contract Carrier Application*, 250 I. C. C. 370, 371; *G. M. Cox Shipyard, Inc., Applications*, 260 I. C. C. 20; *W. R. Osborn Applications*, 260 I. C. C. 85. Appellant recognizes this rule (R. 97). Since the Commission may not regulate contract water carriers engaging in exempt transportation, it would be strange if it could regulate them when such transportation is performed via chartering operations.

[18] There were 44 instances of chartering in the more than six years covered by appellant's statement of services from

Furthermore, the Commission may give only that weight to an applicant's evidence as seems proper,[19] and here it held (R. 11) that appellant's evidence of chartering operations was too meager to warrant a finding that appellant, on January 1, 1940, was engaged in chartering operations subject to Part III of the Act. Moreover, the record is barren of information as to the services

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January 1, 1936, to August 11, 1942 (R. 117–126). All but two, one in 1936 and one in 1941 (R. 118, 124), had Cairo, Illinois, as destination and origin and therefore would seem to be exempt under Section 303 (g) (Appendix, *infra*, p. 47) as transportation within a single harbor. The first of the two not falling within Section 303 (g) occurred at a date remote from the "grandfather" date of June 1, 1940 (see *supra*, pp. 20–30), and the second occurred after the "grandfather" date; therefore, neither furnishes a foundation for "grandfather" rights. Furthermore, of these 44 charters, the six to the United States Engineers in 1937 (R. 119) are too remote, and nineteen are seemingly exempt under Section 303 (f) (2) since made to other carriers (R. 119, 121, 122–125). Of the remaining nineteen, seven were to steel companies (R. 121–122, 125), three to Standard Oil (R. 126), one to a sand company (R. 123) and one to a cement company (R. 125), indicating probable exemptions under Section 303 (b) and (d); see R. 70, 97. The remaining seven apparently involved only one harbor, Cairo, Illinois, and were exempt under Section 303 (g); the charterers' business and usage of the equipment were undisclosed (R. 117–126).

[19] *Swayne & Hoyt, Ltd.* v. *United States*, 300 U. S. 297; *Mississippi Valley Barge Co.* v. *United States*, 292 U. S. 282; *Western Paper Makers' Chemical Co.* v. *United States*, 271 U. S. 268, 269; *Manufacturers Ry. Co.* v. *United States*, 246 U. S. 457; *Pennsylvania Co.* v. *United States*, 236 U. S. 351; *Loving* v. *United States*, 32 F. Supp. 464, 467 (W. D. Okla.), affirmed *per curiam*, 310 U. S. 609.

rendered, the commodities carried in, or the points served with the vessels during the "grandfather" period, so that the Commission could not here satisfy the mandate of Section 309 (g), which requires that the "business of the carrier and the scope thereof" be specified in permits (*Noble* v. *United States*, 319 U. S. 88, 91, 92)[20] to preserve substantial parity between future operation and prior *bona fide* operations. Appellant now states (Br. 16) that it would be unable to show the nature of the chartering services rendered, the commodities carried in, or the points served with the chartered vessels. However, appellant's president testified at the hearing that the chartered vessels were run with appellant's crews (R. 93–94), that its masters were handed manifests disclosing the cargoes carried (R. 78–79), and that its trip sheets would reveal where the chartered vessels went (R. 84).

Appellant bottoms its chartering argument on *C. F. Harms Co. Contract Carrier Application*, 260 I. C. C. 171 (Br. 16, 17, 18), where the full Commission granted a contract carrier "grandfather" chartering rights without any limitation as to the territory in which the vessels might be used by the hirer. The Commission and Division

[20] *Lee Wilson & Co. Contract Carrier Application*, 29 M. C. C. 525, which appellant claims is more applicable to it than the *Noble* case (Br. 19), is inapt, for it dealt solely with non-exempt transportation of a wide variety of commodities (29 I. C. C. at pp. 527, 530–531).

4 had found that, in contrast to the instant case, the applicant had furnished sufficient proof of "grandfather" chartering operations.[21] The full Commission enlarged the territorial rights granted by Division 4 because it was of the view that a limitation to the territory the hirers had served would not have described applicant's "grandfather" operations as established by its evidence. The case is not inconsistent with the present case. The carrier there had proved that its chartered vessels carried a variety of commodities and that it was not concerned with the nature of the commodities carried by the charterers (250 I. C. C. 685, 687), thereby making it unnecessary for the Commission to limit the applicant's permit to certain commodities in order to describe its business under Section 309 (g). Here there was no showing (see R. 117–126) that appellant's chartering operations were not exempt or that appellant was unconcerned with the nature of the commodities carried by the charterers. All but four of its barges are equipped only for exempt transportation (R. 10, 12; Br. 5). Besides, the applicant in the *Harms* case had proved what type of equipment it used in its chartering operations, so that the Commission was able to limit its operations under Section 309 (g) to the furnishing of non-self-propelled deck scows (250 I. C. C. 685, 687; 260 I. C. C.

[21] To realize the elaborate proof offered in the *Harms* case, see 250 I. C. C. 513, 514–515.

171, 173). Cf. *Crescent Express Lines* v. *United States*, 320 U. S. 401, 408–409. In contrast, appellant introduced no evidence of the type of vehicle used in its chartering operations (R. 117–126). And in the *Harms* case, the full Commission held to the rule that "grandfather" rights can only be predicated on a showing of what the carrier "does in bona fide [chartering] operation" on the statutory date (260 I. C. C. 171, 172). Appellant's proof does not show what its chartering operations were on the "grandfather" date (see R. 117–126, 81, 82), and it did not petition the Commission for permission to introduce further evidence after the Commission announced its decision. If this Court thinks that the *Harms* case[22] stands for the principle that an applicant for chartering rights need only show the fact of chartering on and after the "grandfather" date and on such showing must be given a permit without restriction as to territory or commodities, we submit that it be disapproved as contrary to Section 309 (f) and (g) and such cases as *Crescent Express Lines* v. *United States*, 320 U. S. 401, 408–409; *Noble* v. *United States*, 319 U. S. 88, 91, 92; *United*

[22] The *Harms* case was submitted to the full Commission on October 7, 1943, and decided on January 4, 1944. Appellant's petition for reconsideration was filed on August 25, 1943, and denied on December 6, 1943. The Commission apparently thought the two cases distinguishable or it would have granted appellant's petition.

States v. *Carolina Carriers Corp.*, 315 U. S. 475; *Alton R. Co.* v. *United States*, 315 U. S. 15. See the dissenting opinion of Commissioner Porter in the *Harms* case, in which Commissioners Miller and Rogers joined (260 I. C. C. at pp. 173–174).

Appellant's petition for reconsideration was denied on December 6, 1943, and the *Harms* case was decided less than a month thereafter. Since appellant relies so heavily on that decision, it should have exhausted its administrative remedy by appealing to the Commission on this ground before filing its complaint in court.[23] At any rate, courts are not concerned with the consistency or inconsistency of the Commission's decision in a particular case with other decisions which it has rendered. *Virginian Railway Co.* v. *United States*, 272 U. S. 658, 663; *Western Paper Makers' Chemical Co.* v. *United States*, 271 U. S. 268, 271; *Georgia Public Service Commission* v. *United States*, 283 U. S. 765, 775; cf. *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U. S. 591, 602.

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[23] See *Yakus* v. *United States*, 321 U. S. 414, 434; *Natural Gas Co.* v. *Slattery*, 302 U. S. 300, 310, 311; *Porter* v. *Investors Syndicate*, 286 U. S. 461, 468, 471; *Board of Railroad Commissioners* v. *Great Northern Ry.*, 281 U. S. 412, 424; *Great Northern Ry.* v. *Merchants Elevator Co.*, 259 U. S. 285–291; *Prentis* v. *Atlantic Coast Line Co.*, 211 U. S. 210, 224; *United States* v. *Sing Tuck*, 194 U. S. 161, 168; *Carolina Scenic Coach Lines* v. *United States*, 56 F. Supp. 801, 804–805 (W. D. N. C.), affirmed *per curiam*, December 11, 1944, No. 637, present Term; *Board of Public Utility Com'rs.* v. *United States*, 21 F. Supp. 543, 549 (D. N. J.); cf. *Chicago, St. P., M. & O. Ry. Co.* v. *United States*, 322 U. S. 1, 3–4; see also Berger, *Exhaustion of Administrative Remedies* (1939), 48 Yale L. J. 981.

II

THE COMMISSION CORRECTLY DENIED APPELLANT A PERMIT TO CONDUCT NEW OPERATIONS SINCE THERE WAS NO SHOWING THAT THEY WOULD BE CONSISTENT WITH THE PUBLIC INTEREST AND THE NATIONAL TRANSPORTATION POLICY

Besides filing an application for a "grandfather" permit, appellant filed an alternate application for a permit to authorize operations under Section 309 (g), which requires that proposed operations "be consistent with the public interest and the national transportation policy declared in this Act".[24] The Commission held that appellant failed to show that such operations "would be consistent with the public interest and the national transportation policy" (R. 13).[25] Appellant's president testified at the hearing as follows (R. 66):

> That is an application form for a new operation. I never did think it applied to us, but it was, more or less, suggested by the

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[24] The national transportation policy is set forth in the Appendix, *infra*, p. 45.

[25] Appellant was required to make such a showing. *Doyle Transfer Co.* v. *United States*, 45 F. Supp. 691, 696 (D. D. C.); *Keeler Common Carrier Application*, 32 M. C. C. 567, 568; *Weller Contract Carrier Application*, 31 M. C. C. 202, 204; *Murphy Common Carrier Application*, 29 M. C. C. 787, 788; *Motor Convoy, Inc., Contract Carrier Application*, 2 M. C. C. 197, 201; *House Contract Carrier Application*, 1 M. C. C. 725, 728; *McBroom Contract Carrier Application*, 1 M. C. C. 423, 426.

> Bureau of Water Carriers. We filed it as a matter of an abundance of caution and after consulting counsel, we concluded to file it. It seeks rights to operate as an irregular contract carrier over the waters of the Mississippi River and Ohio River systems and their tributaries.[26]

And appellant now admits (Br. 20) that it is not proposing the establishment of a new operation. Nevertheless, it is insisted that the Commission arbitrarily refused to grant appellant "new" rights.

What is "consistent with the public interest and the national transportation policy" (sec. 309 (g)) is an ultimate question of fact for the expert judgment of the Commission, whose determination thereof will not be set aside if supported by a rational basis and substantial evidence.[27] Although the meaning of the quoted phrase and "public convenience and necessity" (sec. 309 (c)) is not identical, both have reference to the public need for adequate transportation.[28] In fact, "public inter-

[26] See a statement to the same effect by appellant's counsel (R. 65).

[27] *Chesapeake & Ohio Ry.* v. *United States*, 283 U. S. 35, 42; *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125, 145–146; *McLean Trucking Co.* v. *United States*, 321 U. S. 67, 87–88; *Davidson Transfer & Storage Co.* v. *United States*, 42 F. Supp. 215 (E. D. Pa.), affirmed *per curiam*, 317 U. S. 587.

[28] *Chesapeake & Ohio Ry.* v. *United States*, 283 U. S. 35, 42; *N. Y. Central Securities Co.* v. *United States*, 287 U. S.

est", as found in Section 5 (2) of the Act, was defined in *N. Y. Central Securities Co.* v. *United States*, 287 U. S. 12, 25, as follows:

> * * * the term public interest * * * is not a concept without ascertainable criteria, but has direct relation to adequacy of transportation service, to its essential conditions of economy and efficiency, and to appropriate provision and best use of transportation facilities, questions to which the Interstate Commerce Commission has constantly adressed itself in the exercise of the authority conferred. * * *

See also *Texas* v. *United States*, 292 U. S. 522, 531; *United States* v. *Lowden*, 308 U. S. 225, 230; *McLean Trucking Co.* v. *United States*, 321 U. S. 67, 80–81. And the national transportation policy, among other things, is "to promote safe, adequate * * * and efficient service."

Here there was no evidence by shippers as to any need for new operations by appellant (*D'Agata Contract Carrier Application*, 2 M. C. C. 339, 340), nor was there any showing of inadequacy

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12, 25; *North Coast Transportation Co.* v. *United States*, 54 F. Supp. 448 (N. D. Cal.), affirmed *per curiam*, October 9, 1944, No. 275 present Term; *Carolina Scenic Coach Lines* v. *United States*, 56 F. Supp. 801 (W. D. N. C.), affirmed *per curiam*, December 11, 1944, No. 637 present Term; *Crichton* v. *United States*, 56 F. Supp. 876 (S. D. N. Y.), affirmed *per curiam*, January 29, 1945, No. 732 present Term; *Wernig Extension*, 9 M. C. C. 267, 268.

of the existing transportation facilities.[29] The only evidence that the proposed operations would be consistent with the public interest and the national transportation policy was the fact that appellant had in the remote past been in operation (see R. 116). Appellant cites several decisions[30] of the Commission where continuous past operations were considered as an indication that public interest required continuance of such operations, but those cases all involved non-exempt operations. Here, as we have pointed out, no non-exempt operations had been conducted since 1936, except possibly a few insufficiently proved chartering operations. It seems obvious that exempt transportation furnished by the appellant fur-

[29] In fact, several carriers protested against the proposed operations (R. 9). Cf. *Grauwiller Contract Carrier Application*, 260 I. C. C. 211, 218.

In *Newtex Steamship Corporation, Common Carrier Application*, decided January 11, 1945, by Division 4, relied on by appellant (Br. 24), many interests supported the application, and the applicant proved that the general public needed a resumption of the services performed by applicant's predecessor.

[30] *Reedville Oil & Guano Co. Contract Carrier Application*, 250 I. C. C. 71, 73; *John L. Goss Contract Carrier Application*, 250 I. C. C. 101, 103; *Choctaw Transportation Co. Contract Carrier Application*, 250 I. C. C. 106, 107. It should be noted that these were also Division 4 decisions.

In *Scott Bros., Inc., Collection and Delivery Service*, 2 M. C. C. 155 (Br. 21), the carrier's past operations were non-exempt; the Commission relied too on a phrase in Section 213 of Part II (2 M. C. C. at p. 164) which was repealed by the Transportation Act of 1940, 54 Stat. 898, 924, and carried into the proviso of Section 5 (2) (b) of Part I, which proviso is inapplicable to water carriers.

nishes no evidential value that non-exempt transportation by it would be consistent with the public interest and the national transportation policy. *Atwacoal Transportation Company Contract Carrier Application,* decided February 12, 1945, by Division 4, not yet reported. There is not a scintilla of evidence of any outstanding executory contract for the performance of non-exempt transporation, or any offer of such a contract (cf. R. 97).[21] This type of evidence is of large importance. *Conners Marine Co. Inc. Contract Carrier Application,* 250 I. C. C. 381, 385. Moreover, the concluding portion of Section 309 (g) reads as follows:

> Provided, however, That no terms, conditions, or limitations shall restrict the right of the carrier to substitute or add contracts within the scope of the permit, or to add to his equipment, facilities, or service, within the scope of the permit, as the development of the business and the demands of the carrier's patrons shall require.

The right to "substitute or add contracts" implies the existence of actual contracts (or *bona fide* offers thereof) when the "permit" is issued, and the expression "within the scope of the permit" implies that the Commission shall restrict the

[21] Four of appellant's barges were available for non-exempt transportation (R. 10, 71, 73), but no evidence was offered that these barges were needed by anybody or that any contract had been made for their use in exempt or non-exempt service.

permit to the type of operations shown by an applicant's contracts. Cf. *Noble* v. *United States*, 319 U. S. 88; *Crescent Express Lines* v. *United States*, 320 U. S. 401. Appellant's claim that its past operations alone justify a permit under Section 309 (g) to transport commodities generally, if upheld, would nullify the effect of this proviso.

As stated, Section 309 (g) requires that the "proposed service" of contract carriers be consistent, not only with the public interest, but also with the national transportation policy.[*] That policy insists that the Act be administered to "foster sound economic conditions in transportation and among the several carriers" and to prevent "unfair or destructive competitive practices." (See H. Rep. No. 1217, 76th Cong., 1st sess., p. 4.) Despite appellant's protestations (Br. 25), not a word is said herein about regulating contract carriers for the benefit of common carriers. The Commission is not attempting to regulate contract carriers for the benefit of common carriers, but its regulation of any particular type of carrier is in part for the protection of all other carriers, both common and contract. The protection intended for all carriers would be abrogated if a carrier should, as appellant claims, receive a permit to transport commodities generally, without regard for whether the existing services of other carriers are adequate to meet the de-

[*] Common carriers need only show public convenience and necessity. Section 309 (c).

mands of the public. Cf. *McLean Trucking Co.* v. *United States*, 321 U. S. 67, 82–85. The Commission could not here find that appellant's "proposed service" would be consistent with the public interest and the national transportation policy, for appellant did not furnish any evidence as to "proposed service". Consequently, the Commission could not judge the effect of a new operation on the public interest and national transportation policy. It would not "foster sound economic conditions" within the national policy to grant a "new" permit to appellant, when so far as shown by the record, there is no public need for such service. Cf. *C. & D. Oil Co. Contract Carrier Application*, 1 M. C. C. 329, 332.

The Commission pointed out (R. 12) that though appellant's present exempt petroleum movement is an emergency operation occasioned by the war, even considering its normal operation for a period of approximately five years before the war, there was no showing of non-exempt transportation except for the one shipment of fabricated steel and piling in 1936. Certainly under these circumstances there was a rational basis in the record for the Commission's conclusion that appellant's past operations did not establish that for it to engage in wide scale non-exempt operations would be in the public interest.

Appellant urges (R. 7, 32; see Br. 20) that the Commission erred in overruling the trial examiner's recommendation that a permit for new

operations under Section 309 (g) should be issued. Congress has vested the authority to make decisions in the Commission rather than in its examiners, and the Commission may reject any conclusions of its examiners which it deems erroneous. *Baltimore & Ohio Railroad Co.* v. *United States*, 298 U. S. 349, 370–371; cf. *Federal Radio Commission* v. *Nelson Bros. Co.*, 289 U. S. 266, 285–286; *National Labor Relations Board* v. *Botany Worsted Mills*, 133 F. 2d 876 (C. C. A. 3), certiorari denied, 319 U. S. 751.

If it files another application under Section 309 (g) at such time as it may actually contemplate engaging in transportation of the sort for which authority is required, appellant will be given opportunity to present evidence that its proposed operations would be consistent with the public interest and the national transportation policy.

CONCLUSION

For the foregoing reasons, the decree of the district court should be affirmed.

Respectfully submitted.

CHARLES FAHY,
Solicitor General.

WALTER J. CUMMINGS, Jr.,
Attorney.

DANIEL W. KNOWLTON,
Chief Counsel,

ALLEN CRENSHAW,
Attorney,
Interstate Commerce Commission.

MARCH 1945.

APPENDIX

The National Transportation Policy, as set forth in the Transportation Act of 1940, is as follows (54 Stat. 899):

> It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, of unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.

Part III of the Interstate Commerce Act, as enacted by the Transportation Act of 1940, 54 Stat. 898.

Section 302 (e) provides in part:

> The term "contract carrier by water" means any person which, under individual contracts or agreements, engages in the transportation (other than transportation referred to in paragraph (d) and the exception therein) by water of passengers or property in interstate or foreign commerce for compensation.
>
> The furnishing for compensation (under a charter, lease, or other agreement) of a vessel, to a person other than a carrier subject to this Act, to be used by the person to whom such vessel is furnished in the transportation of its own property, shall be considered to constitute, as to the vessel so furnished, engaging in transportation for compensation by the person furnishing such vessel, within the meaning of the foregoing definition of "contract carrier by water". * * * (49 U. S. C. 902 (e).)

Section 303 (b) provides in part:

> Nothing in this part shall apply to the transportation by a water carrier of commodities in bulk when the cargo space of the vessel in which such commodities are transported is being used for the carrying of not more than three such commodities. * * * (49 U. S. C. 903 (b).)

Section 303 (d) provides:

> Nothing in this part shall apply to the transportation by water of liquid cargoes in bulk in tank vessels designed for use exclusively in such service and certified under regulations approved by the Secretary of Commerce pursuant to the provisions of section 4417a of the Revised Statutes (U. S. C., 1934 edition, Supp. IV, title 46, sec. 391a). (49 U. S. C. 903 (d).)

Section 303 (g) provides in part:

> Except to the extent that the Commission shall from time to time find, and by order declare, that such application is necessary to carry out the national transportation policy declared in this Act, the provisions of this part shall not apply (1) to transportation in interstate commerce by water solely within the limits of a single harbor * * *. (49 U. S. C. 903 (g).)

Section 309 (f) provides:

> Except as otherwise provided in this section and section 311, no person shall engage in the business of a contract carrier by water unless he or it holds an effective permit, issued by the Commission authorizing such operation: *Provided*, That, subject to section 310, if any such carrier or a predecessor in interest was in bona fide operation as a contract carrier by water on January 1, 1940, over the route or routes or between the ports with respect to which application is made, and has so operated since that time (or if engaged in furnishing seasonal service only, was in bona fide operation during the seasonal period, prior to or including such date, for operations of the character in question) except, in either event, as to interruptions of service over which the applicant or its predecessor in interest had no control, the Commission shall issue such permit, without further proceedings, if application for such permit is made to the Commission as provided in subsection (g) of this section and prior to the expiration of one hundred and twenty days after this section takes effect. Pending the determination of any such appli-

cation, the continuance of such operation shall be lawful. If the application for such permit is not made within one hundred and twenty days after this section takes effect, it shall be decided in accordance with the standards and procedure provided for in subsection (g), and such permit shall be issued or denied accordingly. Any person, not included within the provision of the foregoing proviso, who is engaged in transportation as a contract carrier by water when this section takes effect may continue such operation for a period of one hundred and twenty days thereafter without a permit, and, if application for such permit is made to the Commission within such period, the continuance of such operation shall be lawful pending the determination of such application. (49 U. S. C. 909 (f).)

Section 309 (g) provides:

Application for such permit shall be made to the Commission in writing, be verified under oath, and shall be in such form and contain such information and be accompanied by proof of service upon such interested parties as the Commission shall, by regulations, require. Subject to section 310, upon application the Commission shall issue such permit if it finds that the applicant is fit, willing, and able properly to perform the service proposed and to conform to the provisions of this part and the requirements, rules, and regulations of the Commission thereunder, and that such operation will be consistent with the public interest and the national transportation policy declared in this Act. The business of the carrier and the scope thereof shall

be specified in such permit and there shall be attached thereto at time of issuance and from time to time thereafter such reasonable terms, conditions, and limitations, consistent with the character of the holder as a contract carrier by water, as are necessary to carry out the requirements of this part or those lawfully established by the Commission pursuant thereto: *Provided, however,* That no terms, conditions, or limitations shall restrict the right of the carrier to substitute or add contracts within the scope of the permit, or to add to his equipment, facilities, or service, within the scope of the permit, as the development of the business and the demands of the carrier's patrons shall require. (49 U. S. C. 909 (g).)

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